

Fool me once

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I wish I could report that the EU Commission has finally decided to take Poland to court. I still can't, though. The decision was expected on Wednesday but there is still no communication, allegedly in order not to disturb the EU summit in Salzburg. Monday then, we are told. One could take the view that the Commission has been being walked all over by Poland and by Hungary for so long that a few days more don't matter much any more. On the other hand, the PiS government is busy creating *faits accomplis* on the ground as we speak. With every day that goes by without the ECJ intervening by means of an injunction, more constitutional damage is done and will be next to impossible to undo later.

A brief reminder about the facts: The PiS government, after subduing the Constitutional Court and the National Council of the Judiciary, is currently at work to bring the Supreme Court to heel, the last pillar of an independent judiciary in Poland, by forcing a large part of its most senior judges into retirement and replacing them with their own people. This applies in particular to Chief Justice Ma#gorzata Gersdorf whose six-year term of office is fixed directly in the constitution. Gersdorf, along with most of her colleagues concerned, has so far steadfastly refused to acknowledge her premature retirement and to quit her job, but it's hard to tell how much longer she can hold out.

The Commission's efforts to fix these issues in a reasonable "dialogue" with the Polish government have been spectacularly unsuccessful, so far. And yet, according to a report by journalist [Andrzej Stankiewicz](#), Prime Minister Mateusz Morawiecki obtained another delay from Commission President Jean-Claude Juncker in order to resolve the conflict with Gersdorf through an eleventh-hour "compromise". Morawiecki's offer: The law on the retirement of Supreme Court judges would be amended to take the decision away from President Andrzej Duda and give it to the court itself. Judges who had already received a letter of dismissal would be allowed to stay but be offered to keep their full salaries if they leave voluntarily. That would include Gersdorf if she agreed to apply to the National Council of the Judiciary for approval, thereby acknowledging that this body is still legitimate after its subjugation by PiS. Morawiecki's offer was made possible because he had refused to co-sign Duda's letters of dismissal, thereby leaving a margin of legal doubt that he could use now.

Gersdorf, however, has apparently refused to take a bite of that poisoned apple, unsurprisingly. The time for dialogue and compromise and mutual concessions is over and has been for a long time. The only one who is in a position to make the Polish government see reason now is the European Court of Justice, and to make that happen it is the Commission's job to initiate an infringement procedure. Jolly old Jean-Claude Juncker has stood by and put spokes in his colleague Frans Timmerman's wheel for long enough while democracy and the rule of law in so many EU member states slid into authoritarian decay. To start finally bringing Poland to

justice is the least he and his "political commission" can do to at least partly repair the damage.

A European party ban

Not long ago, there was a huge commotion in Germany about the state governments' attempt to have the the right-wing extremist party NPD banned before the Federal Constitutional Court – a case that seems oddly forgotten now, given the salience of the topic and the degree of excitement it caused in its day. The Court classified the NPD as anti-constitutional but still unworthy of prohibition for lack of relevance, a solution that probably snuffed out this "militant democracy" instrument for good in Germany. What took its place is a new procedure: anti-constitutional parties don't get banned but their state funding withdrawn.

It has remained largely unnoticed that a [procedure of this kind](#) exists also at the European level since 2017. A European party that is found to violate the fundamental values of the EU under Article 2 TEU can be deregistered and will lose its access to party funding. That the Polish PiS and the Hungarian Fidesz are doing just that has been explicitly stated by the Commission and the EU Parliament respectively – which begs the question what it tells about the European parties they belong to that they tolerate these people in their midst. Two distinguished professors of European law, Alberto Alemanno and Laurent Pech, have now [submitted this question to the European Parliament](#), and I, knowing both, don't think it's likely they will relent before they have received a satisfactory answer.

The procedure is complicated. The assessment of party loyalty to the fundamental constitutional values of the EU is not a matter of court adjudication, unlike in Germany. Neither is it left to the EU's power apparatus itself, though, but to an independent authority supported by a "committee of independent personalities" consisting of six members – currently the Spanish ex-constitutional judge Maria Emilia Casas and the Italian MEP Carlo Casini (nominated by Parliament), the two ex-Commissioners Antonio Vitorino and Meglena Kuneva (Commission) and the Danish political scientist Rebecca Adler-Nissen as well as, look at that, our own Christoph Möllers (Council).

If this procedure gets under way now, that is a good thing – not so much because I expect or want ACRE and EPP to be deregistered (which they won't, of course), but because it helps forcing the EU institutions and, ultimately, both parties to show their colours, to decide if they price their loyalty to PiS and Fidesz higher than their loyalty to the constitutional values of the EU and to assume responsibility for it.

Throbbing temples

Meanwhile, **Germans** are rubbing their eyes and temples while they watch the already beyond-belief *Maaßen* affair run its disastrous course. Hans-Georg Maaßen, the head of the Federal internal intelligence service, had spread fake news allegations and alleged fake news instead of intelligence, so, after much to-ing and

from-ing, the chiefs of the three coalition parties CDU, CSU and SPD had ultimately decided to relieve the man of his duties. One of them, though, is Horst Seehofer, the current Home Secretary and Maaßen's boss and a rather quirky personage in general, which is why the disgraced top spook ended up in a new job as an Under-Secretary of State in Seehofer's own department – a promotion, actually. That did not sit well at all with the disbelieving public, and the result is a government at the brink of collapse, a wide-spread loss of confidence in the political establishment in general and all three coalition party chiefs exposed to the question of what the f*** they had been thinking.

From a constitutional point of view, the affair raises a number of thorny questions, though: [JÖRN REINHARDT](#) clarifies to which extent a Federal intelligence official is out of line and overstepping his competences if he does what Maaßen did. [CHRISTOPH SCHÖNBERGER](#), to the great surprise of much of the German commentariat, considers it legally unproblematic to put Maaßen into temporary retirement even against the will of the Home Secretary, as long as the Chancellor and the Federal President want and answer for this decision. HEIKO SAUER, on the other hand, contradicts: Sacking Maaßen is subject to the principle of departmental responsibility (*Ressortprinzip*) of Article 65 Grundgesetz and therefore for Seehofer to decide and no-one else, whatever the government's rules of procedure say, and so is Maaßen's promotion.

In **Bavaria**, elections are about to take place, and there is every reason to believe that finding a majority in the state of formerly unshakable CSU dominance will become an extremely difficult and protracted affair. This can become a real problem, as the Bavarian constitution sets very short deadlines for the formation of the government. [FRANZ-JOSEF LINDNER](#) explains what this entails and how it fits into the constitutional situation in other German states (all German).

As far as **Hungary** and the Article 7 procedure initiated by the European Parliament are concerned, [KLAUS BACHMANN](#) warns against the expectation that this procedure will have much effect *per se* – effect is to be expected rather from the resulting erosion of mutual trust, although to the benefit of no-one.

From the examples of **Hungary and Poland**, [DIMITRY KOCHENOV](#) and [PETRA BÁRD](#) derive the four instruments in the autocratic toolbox the use of which has been brought to perfection by the regimes of these two countries to demolish the rule of law.

Poland's membership of the European Network of Councils for the Judiciary (ENCJ), after the subjugation of the Polish National Council of the Judiciary, has been suspended by an overwhelming majority. The **Bulgarian** delegation, however, has abstained. [RADOSVETA VASSILEVA](#) describes how that came about and how appalling the state of independence of the judiciary is in Bulgaria.

In **Switzerland**, the Federal Supreme Court has made itself politically unpopular with its rulings on cantonal electoral law. Now, a constitutional amendment has become more likely in Parliament, in order to safeguard the electoral status quo against further interventions by the Court. [ANDREAS GLASER](#) reports.

Judicial interventionism has reached a whole different level in **Pakistan**: The Chief Justice, driven to desperation by the inaction of the legislative and executive branches, has personally taken on the task to collect money for a dam project, to name just the most striking example described by [ADEEL HUSSAIN](#).

In the **UK**, the secret services are monitoring communication on the Internet to a staggering extent, as revealed by Edward Snowden. The European Court of Human Rights in Strasbourg has now taken a stance on the limits of surveillance, analysed by [MARIA TZANOU](#).

36 years ago, Maronite militias in **Lebanon**, aided and abetted by the Israeli army, massacred Palestinian refugees in the camps of Sabra and Shatila. [JAMAL EL-ZEIN](#) asks about the legal responsibilities for this widely forgotten atrocity.

The ruling of the **Indian** Supreme Court on the decriminalisation of gay sex is placed in the context of British colonial "Sodomy Laws" by [EUGENIE MÉRIAU](#).

Finally, the **European** Court of Justice's Advocate General this week delivered his opinion on the question how *halal* meat fits with the EU organic seal. [EIKE MICHAEL FRENZEL](#) analyses the opinion and appreciates that the AG refrained from "zoning up the legal issues of this case to the level of constitutional law".

Elsewhere

[LORNA WOODS](#) examines the planned **EU** directive on terror propaganda on the Internet from a free-speech point of view.

[DANIEL BRETT](#) explains why the mass protests in **Romania** have had so little political impact, so far.

[CONOR GEARTY](#), under the headline "Why we must all now be with Rees-Mogg", pleads for a catastrophically hard Brexit under responsibility of the most hard-core Brexiteers as the only way to bring forth the necessary cathartic effect in **Great Britain**.

[RONAN McCREA](#) sees Hungary and Poland and the loss of confidence of the EU member states as a much greater danger for the **EU** than Brexit.

[PIERRE DE VOS](#) explains the **South African** Constitutional Court's decision to declare the criminalisation of cannabis unconstitutional.

[VICTOR AUDUBERT](#) examines the ruling of the **Bolivian** Constitutional Court, which grants President Evo Morales and his deputy yet another term in office even while the constitution says explicitly otherwise.

[HAIM ABRAHAM](#) reports on the first court decision in **Israel** that makes use of the new law on the Jewish nation state and privileges Jewish over other terror victims.

[STEFANUS HENDRIANTO](#) highlights the contribution of the Constitutional Court of **Indonesia** to the dismal choice between the devil and deep blue sea that is the presidential elections of 2019.

So much for the topics of this week. In case you are new here and haven't heard yet, or made up your mind, for that matter: To keep our service afloat, we **depend on the help of our readers**. With a voluntary subscription of only 4 Euro you can support us [here](#), with a one-time support or any other freely adjustable sum [here](#). Thank you very much, indeed, and all the best!

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